

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

Case No. 2:18-CR-256 JCM (VCF)

8 Plaintiff(s),

ORDER

9 v.

10 DOUGLAS HAIG,

11 Defendant(s).

12
13 Presently before the court is plaintiff United States of America's ("the government")
14 motion *in limine* to exclude arguments and evidence regarding the Second Amendment. (ECF No.
15 42). Defendant Douglas Haig filed a non-opposition response. (ECF No. 59).

16 Also before the court is the government's motion *in limine* to exclude arguments and
17 evidence regarding prosecutorial charging decisions and allegations of selective prosecution.
18 (ECF No. 53). Haig filed a non-opposition response. (ECF No. 60).

19 Also before the court is Haig's motion *in limine* to exclude evidence regarding armor
20 piercing and tracer ammunition. (ECF No. 64). The government filed a response (ECF No. 75),
21 to which Haig replied (ECF No. 77).

22 Also before the court is Haig's motion *in limine* to exclude Erich Smith's expert testimony
23 regarding toolmark evidence. (ECF No. 80). The government filed a response (ECF No. 82), to
24 which Haig replied (ECF No. 84).

25 **I. Facts**

26 This action arises from the investigation into the October 1, 2017, mass shooting, where
27 Stephen Paddock opened fire on a crowd of over 22,000 concertgoers at the Route 91 Harvest
28 music festival on 3901 South Las Vegas Boulevard, Las Vegas, Nevada. (ECF No. 1).

1 On the evening of October 1, 2017, Paddock positioned himself in rooms 134 and 135 on
2 the 32nd floor of the Mandalay Bay Resort and Casino, which were in an elevated position
3 overlooking the concert venue. *Id.* Paddock brought with him a remarkable arsenal including over
4 twenty firearms, hundreds of rounds of ammunition (mostly in preloaded high-capacity
5 magazines), and range finding devices. *Id.* At approximately 10:05 p.m., Paddock used these
6 weapons to attack the concertgoers from his hotel rooms, killing fifty-eight and injuring 869
7 people.¹

8 After obtaining and executing search warrants on Paddock's hotel rooms, law enforcement
9 officials found Paddock's body, the weapons, and hundreds of rounds of spent ammunition. *Id.*
10 The officers and agents also found an Amazon.com cardboard shipping box in the hotel rooms,
11 marked with the name Douglas Haig and the address 4323 East Encanto Street, Mesa, Arizona.
12 *Id.*

13 On October 2, 2017, and October 5, 2017, Bureau of Alcohol, Tobacco, Firearms and
14 Explosives ("ATF") agents and Federal Bureau of Investigation ("FBI") agents arranged
15 interviews with Douglas Haig and his business partner (hereinafter "Associate"). *Id.* Haig and
16 Associate admitted that they had interacted with Paddock on multiple occasions. *Id.* Their first
17 interaction with Paddock was on or about August 27, 2017, at a gun show in Las Vegas Nevada.
18 *Id.* Paddock browsed the ammunition samples at their booth and purchased forty to fifty rounds
19 of .308 caliber incendiary ammunition. *Id.*

20 Haig and Associate's second interaction with Paddock was in early September 2017 at a
21 gun show in Phoenix, Arizona. *Id.* Haig stated that Paddock attempted to purchase bulk
22 ammunition and that they exchanged telephone numbers to coordinate a future transaction. *Id.*

23 Haig further stated that on September 19, 2017, he spoke with Paddock on the telephone
24 and arranged to complete an ammunition purchase that day. *Id.* Paddock arrived at Haig's
25 residence and purchased 600 rounds of .308 caliber (7.62mm) tracer ammunition as well as 120
26 rounds of M196 .223 caliber tracer ammunition. *Id.* According to Haig, he put the rounds in the

27
28 ¹ LVMPD Criminal Investigative Report of the 1 October Mass Casualty Shooting,
LVMPD Event No: 171001-3519.

1 Amazon.com shipping box, which law enforcement officials found in Paddock's hotel rooms. *Id.*
2 Haig noted that Paddock purchased the munitions with cash and took the time to put on gloves
3 prior to placing the box into the trunk of his vehicle. *Id.*

4 The ATF and FBI agents asked Haig whether he manufactured the ammunition that he sold
5 to Paddock. (ECF No. 42). Haig repeatedly claimed that Lake City Army Ammunition Plant
6 manufactured the ammunition that he sold. *Id.* Haig also stated that he manufactures ammunition
7 only for his personal use. *Id.*

8 During these interviews, the agents observed reloading equipment in Haig's shop, which
9 was in the backyard of his residence located at 4323 East Encanto Street, Mesa, Arizona. (ECF
10 No. 1). Haig voluntarily provided the agents with a sample of ammunitions that he sells to
11 customers and claimed that the ammunition from the Las Vegas crime scene would not have his
12 toolmarks. *Id.*

13 FBI investigators subsequently forwarded evidence from the Las Vegas crime scene to a
14 laboratory for forensic analysis. *Id.* The examination revealed that: (1) two rounds of unfired .308
15 caliber cartridges from Paddock's hotel rooms had Haig's fingerprints; (2) the cartridges had
16 reloading equipment toolmarks; and (3) the cartridges contained armor piercing/incendiary bullets.
17 *Id.*

18 On October 19, 2017, the FBI obtained and executed a search warrant at Haig's residence.
19 *Id.* Law enforcement officials seized over 100 items, including live ammunition, reloading
20 equipment, and ammunition sales records. *Id.* Laboratory analysis confirmed that the ammunition
21 from Haig's residence was reloaded armor piercing ammunition and contained toolmarks
22 consistent with the marks on the reloaded armor piercing rounds from Paddock's hotel rooms. *Id.*
23 Haig does not have a license to manufacture armor piercing ammunition. *Id.*

24 Analysis of the sales records revealed that Haig had engaged in over 100 sales of armor
25 piercing ammunition throughout the country. *Id.* Three of these sales were with customers
26 residing in the state of Nevada. *Id.* Law enforcement officials interviewed these customers and
27 discovered that two of the sales occurred in person at the Cashman Center in Las Vegas, Nevada.
28

1 *Id.* The third sale was an online transaction and the ammunition was shipped to a residence in
2 Elko, Nevada. *Id.*

3 On August 22, 2018, a grand jury in the District of Nevada returned an indictment charging
4 Haig with one count of engaging in the business of manufacturing ammunition without a license
5 in violation of 18 U.S.C. §§ 922(a)(1)(B) and 924(a)(1)(D). (ECF No 10).

6 Throughout the investigation and the pending criminal proceeding, there has been
7 considerable publicity regarding Haig's involvement to the October 1, 2017, shooting. On
8 multiple occasions Haig made various representations in the media regarding his business,
9 Specialized Military Ammunition ("SMA"), which is an Arizona limited liability company. (ECF
10 No. 42). Among these representations, Haig made statements regarding his awareness of laws
11 governing the sale of ammunition and that he runs SMA as a "strong hobby" rather than a business.
12 *Id.*

13 Now, the parties have filed four motions *in limine*. (ECF Nos. 52, 53, 64, 80).

14 **II. Legal Standard**

15 "The court must decide any preliminary question about whether . . . evidence is
16 admissible." Fed. R. Evid. 104. Motions *in limine* are procedural mechanisms by which the court
17 can make evidentiary rulings in advance of trial, often to preclude the use of unfairly prejudicial
18 evidence. *United States v. Heller*, 551 F.3d 1108, 1111–12 (9th Cir. 2009); *Brodit v. Cambra*, 350
19 F.3d 985, 1004–05 (9th Cir. 2003).

20 "Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the
21 practice has developed pursuant to the district court's inherent authority to manage the course of
22 trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1980). Motions *in limine* may be used to
23 exclude or admit evidence in advance of trial. *See* Fed. R. Evid. 103; *United States v. Williams*,
24 939 F.2d 721, 723 (9th Cir. 1991) (affirming district court's ruling *in limine* that prosecution could
25 admit impeachment evidence under Federal Rule of Evidence 609).

26 Judges have broad discretion when ruling on motions *in limine*. *See Jenkins v. Chrysler*
27 *Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); *see also Trevino v. Gates*, 99 F.3d 911, 922 (9th
28 Cir. 1999) ("The district court has considerable latitude in performing a Rule 403 balancing test

1 and we will uphold its decision absent clear abuse of discretion.”). “[I]n limine rulings are not
2 binding on the trial judge [who] may always change his mind during the course of a trial.” *Ohler*
3 *v. United States*, 529 U.S. 753, 758 n.3 (2000); *accord Luce*, 469 U.S. at 41 (noting that *in limine*
4 rulings are always subject to change, especially if the evidence unfolds in an unanticipated
5 manner).

6 “Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by
7 the motion will be admitted at trial. Denial merely means that without the context of trial, the
8 court is unable to determine whether the evidence in question should be excluded.” *Conboy v.*
9 *Wynn Las Vegas, LLC*, No. 2:11-cv-1649-JCM-CWH, 2013 WL 1701069, at *1 (D. Nev. Apr. 18,
10 2013).

11 **III. Discussion**

12 The government requests that the court exclude all arguments and evidence pertaining to
13 the constitutionality of 18 U.S.C. § 922(a)(1)(B) under the Second Amendment because (1) such
14 issues are questions of law for the court and (2) mandatory authority from the Ninth Circuit
15 indicates that offenses under § 922(a)(1) do not violate the Second Amendment. (ECF No. 52).
16 The government also requests that the court exclude all arguments and evidence regarding
17 prosecutorial charging decisions and allegations of selective prosecution as being (1) beyond the
18 province of the trier-of-fact and (2) unnecessarily prejudicial, confusing, and misleading. (ECF
19 No. 53). Because Haig does not oppose these requests, the court will grant the government’s
20 motions *in limine* (ECF Nos. 52, 53). *See* (ECF Nos. 59, 60).

21 Haig has filed two motions *in limine*. (ECF Nos. 64, 80). First, Haig requests that the
22 court exclude evidence regarding armor piercing and tracer ammunition. (ECF No. 64). Second,
23 Haig requests that the court exclude Smith’s expert testimony regarding toolmark evidence. (ECF
24 No. 80). The court addresses each in turn.

25 *a. Evidence regarding armor piercing and tracer ammunition*

26 Haig concedes that the court should allow the government to present evidence of his
27 ammunition sales, but requests that the court exclude any evidence that would identify the
28

1 ammunition as armor piercing or tracer rounds. (ECF No. 64). Specifically, Haig argues that such
2 evidence is inadmissible under Federal Rules of Evidence 401 and 403. *Id.* The court disagrees.

3 *i. Relevance*

4 The type of ammunition Haig sold is relevant because, when taken in conjunction with
5 other circumstantial evidence, it shows that Haig acted willfully.

6 Under Rule 401, evidence is relevant if “(a) it has a tendency to make a fact of consequence
7 more or less probable than it would be without the evidence; and (b) the fact is of consequence in
8 determining the action.” Fed. R. Evid. 401. Any evidence that is not relevant under Rule 401 is
9 inadmissible. Fed. R. Evid. 402.

10 The government brings forth a single charge for engaging in the business of manufacturing
11 ammunition without a license. (ECF No. 10). To prevail at trial, the government must prove
12 beyond a reasonable doubt that Haig willfully violated the respective statutory provision. 18
13 U.S.C. §§ 922(a)(1)(B), 924(a)(1)(D).

14 Haig used SMA to manufacture and sell military style ammunition including armor
15 piercing and tracer rounds. *See* (ECF Nos. 64, 75). A licensed manufacturer can sell or deliver
16 such ammunition only if the ammunition is for (1) the use of the United States, (2) purposes of
17 exportation, or (3) purposes of experimentation that the attorney general has authorized. 18 U.S.C.
18 § 922(a)(7)(A)–(C). Haig did not sell armor piercing and tracer ammunition for any of the
19 purposes that § 922(a)(7) provides. Instead, he sold the ammunition to civilians. *See* (ECF Nos.
20 64, 75). Thus, a license would not have authorized Haig’s alleged manufacturing activities.
21 Haig’s failure to obtain a license under these circumstances shows that he understood the illicit
22 nature of his alleged acts.

23 Further, a license permits the ATF to inspect manufacturing facilities and records. 27
24 C.F.R. §§ 478.121, 478.23(b). The place of manufacture in this case would have been Haig’s
25 personal residence, which contained significant evidence of his manufacturing and selling armor
26 piercing and tracer ammunition. Thus, when Haig failed to get a license, he also prevented his
27 residence from being exposed to inspection. This act of concealment indicates that Haig knew that
28 he was illegally manufacturing ammunition.

1 The armor piercing and tracer ammunition is also relevant because Haig sold these rounds
2 under the false pretenses that SMA was a defense contractor licensed to sell military style
3 ammunition. *See* (ECF No. 75). Haig would not have made these alleged representations unless
4 he knew about the stringent federal licensing requirements for manufacturing and selling
5 ammunition. Moreover, Haig’s former experience as a federal firearms dealer corroborates the
6 government’s contention that Haig was aware of the regulations that control armor piercing and
7 tracer ammunition. *Id.*

8 In sum, Haig’s manufacture of armor piercing and tracer ammunition is inextricably
9 intertwined with other events relevant to the charge in the indictment. This circumstantial
10 evidence, when taken collectively, allows the trier-of-fact to find that Haig willfully engaged in
11 the business of manufacturing ammunition without a license. *See United States v. Hernandez*, 859
12 F.3d 817, 824 (9th Cir. 2017) (holding that the government must often rely on circumstantial
13 evidence to show willful conduct).

14 *ii. Rule 403 concerns*

15 When evidence is relevant, it may still be excluded when “its probative value is
16 substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing
17 the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative
18 evidence.” Fed. R. Evid. 403.

19 The court first notes that the government intends to present many types of military grade
20 ammunition including self-destroying thermite incendiary rounds. (ECF No. 75). Armor piercing
21 and tracer rounds will not uniquely increase the risk of an emotional reaction because Haig does
22 not seek to exclude the remaining military grade ammunition in this case. In addition, the court
23 will use voir dire and jury instructions to ensure that the jury returns a verdict that is not a result
24 of unfair prejudice. *See United States v. Norris*, 423 F. App’x 732, 734 (9th Cir. 2011) (“ . . . we
25 must presume that juries will follow the district court’s limiting instructions.”).

26 As for the remaining Rule 403 concerns, the court will not allow the government to present
27 evidence of armor piercing and tracer ammunition in a confusing or misleading manner. The court
28 will also prevent undue delay, cumulative evidence, and waste in time by requiring the government

1 to efficiently present its case. Further, Haig will be able to raise objections, which the court will
2 consider in determining how to proceed with a fair trial.

3 *b. Smith's expert testimony*

4 Haig requests that the court exclude Smith's expert testimony on forensic toolmark
5 evidence because Smith's methods have not achieved general acceptance in the relevant
6 community. (ECF No. 80). Alternatively, Haig requests that the court conduct a *Daubert* hearing
7 to determine whether Smith's expert testimony is admissible. *Id*

8 Federal Rule of Evidence 702 provides that a witness qualified as an expert may testify if
9 "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to
10 understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient
11 facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert
12 has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

13 In determining whether an expert's testimony is reliable under Rule 702, courts consider
14 "(a) whether the theory or technique can and has been tested; (b) whether the theory or technique
15 has been subjected to peer review and publication; (c) the known or potential rate of error for the
16 technique; and (d) the theory or technique's general degree of acceptance in the relevant scientific
17 community. *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 945 (9th Cir. 2009) (citing
18 *Daubert v. Merrel Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). District judges retain "broad
19 latitude to determine" whether these factors reasonably measure the reliability of an expert
20 witness's testimony. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014)
21 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)).

22 The court first notes that the Ninth Circuit does not require district courts to conduct
23 *Daubert* hearings when evaluating the reliability of an expert. *United States v. Ruvalcaba-Garcia*,
24 923 F.3d 1183, 1189 (9th Cir. 2019). Rather, courts retain discretion in the procedure they use to
25 determine whether expert testimony is admissible under Rule 702. *See Millenkamp v. Davisco*
26 *Foods Int'l, Inc.*, 562 F.3d 971, 979 (9th Cir. 2009). Because Haig raises issues in his motion *in*
27 *limine* that have been well litigated in similar cases, the court need not go beyond the materials in
28

1 the record to fully address Haig's arguments. Therefore, the court adjudicates Haig's motion
2 without conducting a *Daubert* hearing.

3 Smith is a physician scientist with a master's degree in forensic science and approximately
4 twenty years of experience in the field of firearms/toolmarks identification. (ECF No. 25-1). The
5 government intends to use Smith at trial to provide testimony regarding the process of reloading
6 ammunition, the identification of ammunition, the identification of toolmarks on ammunition, and
7 his opinions/conclusions on the ammunition in this case. (ECF No. 50).

8 Smith's testimony is relevant to determine whether Haig manufactured the ammunition
9 that Paddock used. Further, Haig's contention that Smith's methods are unreliable and not
10 generally accepted in the relevant community is incorrect. The Ninth Circuit has consistently
11 affirmed the admission of toolmark identification evidence and expert testimony of that evidence.
12 *See, e.g., United States v. Cazares*, 788 F.3d 956, 988 (9th Cir. 2015); *see also, e.g., United States*
13 *v. Felix*, 727 Fed. App'x 921, 924–925 (9th Cir. 2018). Smith's anticipated testimony falls well-
14 within the type of evidence which the Ninth Circuit has previously considered. Thus, Smith's
15 methods are reliable and his testimony is admissible.

16 Haig also notes that the Ninth Circuit held in *Cazares* that "scientific certainty" is an
17 improper characterization of expert conclusions based on toolmark identification methods. (ECF
18 No. 80). The government concedes this point and represents that Smith will not provide such
19 testimony as it would violate the Department of Justice's uniform standards for testimonies and reports.
20 (ECF Nos. 82, 82-3). Nevertheless, the court will exercise caution and exclude Smith from
21 testifying that he reached his conclusions with scientific certainty or other similar standards of
22 reasonable certainty.

23 **VI. Conclusion**

24 Accordingly,

25 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the government's motion
26 *in limine* (ECF No. 52) be, and the same hereby is, GRANTED.

27 IT IS FURTHER ORDERED that the government's motion *in limine* (ECF No. 53) be, and
28 the same hereby is, GRANTED.

1 IT IS FURTHER ORDERED that Haig's motion *in limine* (ECF No. 64) be, and the same
2 hereby is, DENIED.

3 IT IS FURTHER ORDERED that Haig's motion *in limine* (ECF No. 80) be, and the same
4 hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

5 DATED July 8, 2019.

6 
7 UNITED STATES DISTRICT JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28